

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.28 OF 2015

Vishnu Bhimrao Gudulkar and ors. : Petitioners.
Versus
The State of Maharashtra and ors. : Respondents

Mr. P D Dalvi for the Petitioners.
Mr. S D Rayrikar AGP for the Respondent Nos.1 to 4.
Mr. S S Patwardhan for the Respondent Nos.5, 7 to 17, 19, 21, 24 to 26,
28, 30 and 31 to 37.
Mr. Ajay Magadum for the Respondent No.39.

CORAM : R. M. SAVANT, J.
DATE : 15th April 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 27/11/2014 passed by the Sub-Divisional Officer, Ajara-Bhudergad Sub-Division, Gargoti, District Kolhapur by which order the Revision Application No.1 of 2014 came to be disposed of and the directions came to be issued that the obstruction existing in Gat No.431 on the Kine-Poshratwadi Road running East to West be removed. A further direction was issued that if the said obstruction is not removed, action under Section 188(2) of the Indian Penal Code be initiated.

2 The bone of contention in the above Petition if one can say so is the use of the customary road by the villagers of village Kine. The present proceedings have commenced by the Application dated 28/12/2009 filed by 37

Applicants i.e. the villagers of village Kine alleging obstruction at the hands of the Petitioners whose names are mentioned in the opening paragraph at Sr.Nos.1 to 5 of the said Application. It seems that on the next day i.e. on 29/12/2009 an application was also made by the Sub-Divisional Engineer Class I of the Public Works Department, State of Maharashtra alleging similar obstruction at the hands of the Petitioners. The said two applications dated 28/12/2009 and 29/12/2009 being referable to Section 5 (2) of the Mamlatdar's Court Act 1906 (for short "the said Act") were entertained by the Tahasildar, Ajara. The Tahasildar, Ajara considered the said applications and by his order dated 14/9/2010 allowed the same. The gist of the reasoning as can be found in the said order dated 14/9/2010 was that a case for issuance of an injunction under Section 5(2) of the said Act was made out on account of the obstruction caused by the Petitioners. The Tahasildar, Ajara by the directions issued in the operative part has directed removal of the obstruction and has also enjoined the Petitioners from creating obstruction in future. In the said order dated 14/9/2010 certain antecedent facts to the filing of the Application dated 28/12/2009 have been referred to. The fact relating to the suit filed by the Petitioners against the State Government in the Public Works Department has been referred to. The Tahasildar, Ajara has also referred to the fact that in the suit a Commissioner came to be appointed under Order XXVI Rule 9 of the Code of Civil Procedure for carrying out spot inspection in respect of Gat Nos. 339, 340, 341, 355, 396 and 400/A. However, on account of non-payment of

the process fees by the Petitioners, the said order appointing the Court Commissioner had not fructified and therefore the commission work could not be carried out. The Tahasildar has also referred to the site visit carried out by him having felt it necessary to do so in view of the contentious issue in respect of the obstruction that is there between the parties. The Tahasildar has observed that on such inspection carried out by him it was found that the road was existing and that the Petitioners have obstructed the said road by putting up wooden logs, boulders, mud/sand. The Tahasildar also observed that he has ventured to conduct an inquiry in view of the fact that there was no issue of title involved, and the issue was as regards the removal of the obstruction by the Petitioner.

3 The said order dated 14/9/2010 was carried in Revision by the Petitioners by filing Revision Application No.4 of 2011. The said Revision came to be allowed by the Revisionary Authority, i.e. the Sub Divisional Officer, Gadhinglaj, by her order dated 3/9/2012. The said order ran into about two pages. The said Revision was only allowed on the basis of the orders passed by the Civil Court in the suit filed by the Petitioners against the State Government in the Public Works Department. The said order dated 3/9/2012 passed by the Revisionary Authority was taken exception to by the Respondent Nos.2 to 38 by filing Writ Petition No.2295 of 2013 in this Court. This Court by order dated 12/8/2014 set aside the said order dated 3/9/2012 passed by the

Revisionary Authority and remanded the matter back to the Revisionary Authority for a de-novo consideration of the Revision Application in terms of the directions as contained in the said order. The directions which were issued were inter alia to the effect that the Revision Application was required to be adjudicated on the basis of the findings recorded by the Tahasildar as also on the basis as to whether there is a road existing since many years.

4 Pursuant to the said remand the Revision Application was taken up for a de-novo consideration. However, it seems that the said Revision Application was re-numbered as 1 of 2014 though it was earlier numbered as 4 of 2011 and the Respondent Nos.2 to 38 herein were shown as the Revision Applicants when in fact the Revision Application was filed by the Petitioners herein. However, what is required to be noted is that the Revisionary Authority proceeded to consider the Revision Application in terms of the directions that were issued by this Court in the order dated 12/8/2014 and framed the requisite issues accordingly. The Revisionary Authority framed the following issues (English translation) :- (1) whether the application falls within the ambit of Section 5(2) of the Mamlatdar's Court Act; (2) whether there was a customary road existing in Gat No.431 and whether it is proved that the said road has been obstructed ; (3) whether the orders passed by the Civil Court impact the consideration of the Revision Application. All the said three issues were answered against the Petitioners. The Revisionary Authority has re-

iterated the finding of the Tahasildar on the issue of limitation, on the existence of the customary road and in so far as the impact of the orders passed by the Civil Court is concerned, the Tahasildar held that the said orders have no bearing on the proceedings. As indicated above, it is the said order dated 27/11/2014 passed by the Revisionary Authority i.e. the Sub-Divisional Officer, Ajara Bhudergad Sub-Division, Gargoti, District Kolhapur which is taken exception to by way of the above Petition.

5 The learned counsel appearing on behalf of the Petitioners whilst assailing the order dated 27/11/2014 would contend that in view of non-compliance of Section 8 of the said Act the application was not entertainable. The learned counsel would also contend that the issue of limitation has also not been dealt with satisfactorily by the Authorities below as the Application dated 28/12/2009 is bereft of the fact as to when the cause of action arose. The learned counsel for the Petitioners would contend that no case for exercise of jurisdiction under Section 5(2) of the said Act was made out by the Respondent Nos.2 to 38. The learned counsel would contend that the Application dated 28/12/2009 also does not mention the Gat Number in respect of which the relief is sought by the Applicants. Lastly the learned counsel sought to pick holes in the order by contending that the Revision Application was re-numbered and that the Respondent Nos. 2 to 38, who were actually the Respondents in the Revision Application No.4 of 2011, have been

shown as the Applicants, and therefore, the order is vitiated on the said ground.

6 Per contra, the learned counsel appearing for the Respondents Shri S S Patwardhan would support the impugned order. The learned counsel for the Respondents would contend that assuming that the mandate of Section 8 of the said Act was not followed by the Tahasildar in the matter of making an endorsement on the said application, that would not have any impact on the adjudication which has been done by the Tahasildar as the penal consequences of not following the mandate of Section 8 of the said Act have not been mentioned in the said provision, and therefore, it would have to be held that the said provision is only directory. The learned counsel by drawing this Court's attention to the said application dated 28/12/2009 would contend that the said application in terms states as to when the cause of action arose as the Applicants have stated that the cause of action has arisen today i.e. 28/12/2009 and it is therefore from the said date that the limitation would have be counted. The learned counsel would lastly contend that the orders passed in the suit as well as the order passed by a learned Single Judge of this Court in Writ Petition No.1630 of 2012 would not have impact on the proceedings inasmuch as the said orders have been passed in a suit wherein the Respondent Nos.2 to 38 are not parties and which suit has been filed against the State Government in the Public Works Department for an

injunction restraining the Defendant from constructing a road.

7 Having heard the learned counsel for the parties, I have considered the rival contentions. As indicated herein above the contentious issue amongst the villagers namely the road being blocked by one set of villagers is again brought before this Court by way of the above Writ Petition. As indicated herein above, the application filed by the Respondent Nos.2 to 38 i.e. the villagers of village Kine is dated 28/12/2009. In the said application it is in terms stated that the cause of action for filing the said application was the obstruction by way of wooden logs, boulders, mud/sand created by the Petitioners on the said day i.e. 28/12/2009 on the Kine-Poshratwadi Road running from East to West. It is pertinent to note that the names of the Petitioners are appearing at Sr. No.1 to 5 in the said application. The allegations of the Respondent Nos.2 to 38 can be said to be buttressed by the fact that similar application was made by the Sub-Divisional Engineer, Public Works Department on the next day i.e. 29/12/2009 wherein the Sub-Divisional Engineer, Public Works Department has also alleged the obstruction on the said Kine-Poshratwadi Road by the Petitioners. Hence it is not as if the Respondent Nos. 2 to 38 were alone in making the said application. The Authorities being concerned with the fact that the road was blocked had also made the said application. In view of the fact that the Respondent Nos.2 to 38 have stated that the cause of action arose on 28/12/2009 the limitation would have to be

counted from the said date and if that be so there is absolutely no merit in the contention urged on behalf of the Petitioners that the issue of limitation has not been addressed satisfactorily.

8 Now coming to Section 5(2) of the said Act. The said power can be exercised by the Tahasildar in the eventualities which have been mentioned in the said provision. The Tahasildar as mentioned in the earlier part of this order made a site visit and on such site visit factually found that there was obstruction and on consideration of the material on record by way of photographs also came to a conclusion that there was a existing customary road used by the villagers and the said road was blocked by the Petitioners and therefore exercise of powers under Section 5(2) of the said Act was warranted. It is required to be noted that the endeavour of the Petitioners seems to be to stall the said villagers from using the said road probably because the part of it passes through the lands of the Petitioners. The said reason could only be said to be the reason as to why the Petitioners saw to it that the appointment of Court Commissioner does not fructify in the suit filed by the Petitioners against the State Government in the Public Works Department as otherwise the Petitioners if they were so sure about non-existence of the road ought to have willingly acceded to the Court Commissioner's carrying out the work of commission. The said fact therefore leads to a conclusion that the Petitioners are interested in some-how seeing to it that the road is not made available for

the use of the villagers, hence in so far as exercise of the powers under Section 5(2) of the said Act is concerned, it cannot be said that the said order suffers from any error of jurisdiction on the part of the Tahasildar.

9 Now coming to Section 8 of the said Act. Though a reading of the said Section 8 discloses that the same is couched in a mandatory form, however the penal consequences of non-compliance of the said provision have not been stated. It is trite that where there are no penal consequences for non-compliance of a provision, the said provision is construed to be directory in nature. It would have to be held that the said provision is directory and non-compliance of the same would not vitiate the proceeding. In any event the said provision is a matter of procedure and since it is well settled by the pronouncements of this Court as well as the Apex Court that the procedure is the handmaid of justice and has to be used to further the cause of substantial justice rather than oppress it, in my view, the contention of the learned counsel for the Petitioners cannot be accepted. In any event since the Tahasildar deemed it appropriate to entertain the application, the Respondent Nos.2 to 38 i.e. the villagers cannot be visited with the consequences of the proceedings being vitiated on the ground of non-compliance of section 8.

10 Now coming to the order passed by this Court in Writ Petition No.1630 of 2012. The said Writ Petition had arisen out of an order passed by

the Lower Appellate Court in the suit filed by the Petitioners. The said suit as indicated above has been filed by the Petitioners against the the State Government in the Public Works Department seeking an injunction against the Public Works Department from carrying out construction of the road and asphaltting it. The Application for temporary injunction filed by the Petitioners in the said Suit came to be allowed by the Trial Court by the order dated 8/11/2010. The said order was carried in Appeal by the State by filing Misc. Civil Appeal being No.1 of 2011. The said Misc. Civil Appeal came to be partly allowed by directing the Defendants not to construct the road passing through the lands of the Plaintiffs i.e. the Petitioners herein till ascertaining the amount of compensation to the Plaintiffs or till disposal of the suit. Hence the construction of the said road was contingent upon the two facts mentioned in the said order. The said order dated 15/12/2011 passed by the Lower Appellate Court was taken exception to by way of the said Writ Petition No.1630 of 2012. A learned Single Judge of this Court by the order dated 12/11/2013 admitted the said Petition and granted interim relief in terms of prayer clause (b). By the said prayer clause (b) the Petitioners had sought an order of injunction for restraining the Defendant from constructing the road passing through the lands of the Plaintiffs/Petitioners. In so far as the said proceedings are concerned, it is required to be noted that the Respondent Nos.2 to 38 are not parties to the suit and consequentially were not the parties to the Writ Petition. The Respondents as indicated above had made the instant

application under Section 5 of the said Act for removal of obstruction whereas the Petitioners had filed the suit against the State Government restraining it from constructing the road, hence the construction of the road stand apart from the removal of the obstruction. Hence the contention of the learned counsel for the Respondents Shri S S Patwardhan that the said order passed by this Court would have no impact on the proceedings has merit and would therefore have to be accepted. The Revisionary Authority though has not specifically referred to the order passed by a learned Single Judge of this Court in the said Writ Petition, in my view, the same would not make any difference as this Court has found that the said order passed by a learned Single Judge would have no impact in so far as the relief sought by the Respondent Nos.2 to 38 for removal of obstruction is concerned.

11 In so far as the contention of the learned counsel for the Petitioners based on the numbering of the Revision Application and the description of the parties in the cause title is concerned, in my view, the said fact can hardly impact the decision which has been rendered by the Sub-Divisional Officer which was in the form of direction for removal of obstruction.

12 In that view of the matter, the impugned order does not suffer from any error of jurisdiction or any other infirmity or illegality for this Court

to exercise its writ jurisdiction. The above Writ Petition is accordingly dismissed. All interim orders stand vacated. At this stage the learned counsel for the Petitioners seeks continuation of the ad-interim relief which is operating. Since large number of villagers are affected by the obstruction, the said prayer is rejected.

[R.M.SAVANT, J]